

**Testimony of Karen Scarborough, Undersecretary
State of California Resources Agency
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Senate Environment and Public Works Committee
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**Planning for Conservation under the Endangered Species Act and the
Natural Community Conservation Program**

Good morning, Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to testify today regarding the Endangered Species Act (ESA). Since January 2004, I've had the honor of serving as Undersecretary of the California Resources Agency. Under the leadership of Governor Arnold Schwarzenegger, the state has made great progress to protect the environment and California's natural resources.

California has a strong tradition of environmental protection. We have led the nation in adopting strict standards for air and water quality, supporting zero-emission technologies, and promoting renewable sources of energy.

Governor Schwarzenegger is continuing this tradition through his bold Hydrogen Highway Initiative which calls for 250 hydrogen fueling stations and 20-thousand hydrogen vehicles on California's highways, his One-Million Solar Roof Initiative, and recently signing an executive order launching the Green Building Initiative to make state office buildings more energy efficient.

In June, the Governor set new greenhouse gas emission targets that by 2050 will reduce emissions by 80 percent below 1990 levels. Already, many major California companies are voluntarily joining this effort.

The Governor's natural resource management achievements are equally as bold. The preservation of more than 80-thousand acres of open space and 13 miles of the majestic central California coastline at the famed the Hearst Ranch is a new model of public-private cooperation. The creation of the 25-million acre Sierra Nevada Conservancy also sets a new standard for multi-faceted resource stewardship planned and to be carried out cooperatively by more than a dozen federal and state agencies, 22 counties and several hundred local government entities and districts. The Conservancy boundary encompasses an area approximately 35-80 miles wide that if super-imposed on a map starting from the Dome of the US Capitol would reach beyond Atlanta to the south, beyond Chicago to the west or beyond Boston to the north.

At the Resources Agency, we work to find methods to simultaneously conserve California's unique natural resources and foster thoughtful/sustainable development and economic growth. The Natural Community's Conservation Program and planning process accomplishes this efficiently and effectively. Implementation of the NCCP, which began in 1991, has been an unprecedented effort by the State of California to collaborate with numerous public agencies, utilities and private groups to craft a broad-based ecosystem approach to planning for the protection and perpetuation of biological diversity in the state, while accommodating

compatible growth and appropriate economic development. This balance is the NCCPs greatest benefit as well as its greatest challenge.

The NCCP was modeled after the Habitat Conservation Plan (HCP) process within Section 10 of the Endangered Species Act (ESA). However, the NCCP was intended to promote more comprehensive actions to overcome perceived shortcomings of the federal HCP program. In fact, the conservation standard in the NCCP Act goes beyond the mitigation standard of ESA. Each NCCP comprises a bundle of recovery actions. Notwithstanding the different standards, the NCCP Act and ESA can be blended together almost seamlessly. They complement each other so well that every NCCP permitted to date has also been an HCP. As a result, California's combined NCCP/HCP's have the highest standards for regional conservation plans in the nation.

The NCCP initially targeted some of the highest-priced real estate in the world in Southern California and its coastal sage scrub community, an area with more listed species than anywhere but Hawaii. California's Floristic Province, a zone of Mediterranean-type climate with a high amount of endemic plants, has been identified by several organizations as one of the world's top "biological hot spots". The first plan was completed in 1995, and since then, seven regional plans have been approved, protecting hundreds of thousands of acres of wildlife habitat in Southern California counties alone. Statewide, eleven counties and numerous cities are currently participating in NCCP planning and implementation, as well as electric, gas and water utilities and a private timber company. There are 31 active NCCP's of varying scope and complexity.

San Diego's Multiple Species Conservation Plan (MSCP), is a recognized NCCP and HCP through a signed planning agreement. The MSCP started at the same time as the NCCP but from a different angle. A large scale mitigation plan was required by the US Fish & Wildlife Service (USF&WS) to resolve a federal lawsuit on San Diego's sewage treatment system. San Diego's plan was focused on 93 species and its' study area encompassed 585,000 acres in the southwest corner of the county.

Political leadership was instrumental to the success of San Diego's MSCP. Then Mayor of San Diego, Susan Golding, championed the MSCP on behalf of the participating local governments and affected stakeholders. Her involvement in the process was essential to gaining broad-based support for the program and the engagement of other local governments and stakeholder groups. She also provided the foresight and strength to continue with the plan even after the federal lawsuit that instigated the plan was settled.

My involvement with this program started in 1991 as the appointed Chair of the MSCP Working Group, a thirty-two member group that met every third Wednesday for almost seven years. I later joined Mayor Golding's staff, and helped move the plan to its ultimate passage at the City Council in 1997. Setting a table at which all interested stakeholders are invited, at the outset of the process, is critical. Working Group discussions were predicated on "win-win" scenarios for all who sat around the table and participated in the plan development. Consensus was the principle used at all meetings. It enabled moving through the process to arrive at outcomes, from disputes to certainty.

The MSCP was predicated on a partnership between federal, state, local and private representatives. It linked federal policy to local government (where most land use authority resides), to local needs (e.g., for open space, quality of life, and balanced development), and to local stakeholders (who could help with implementation and build political support). More was accomplished through these links than the ESA could have accomplished on its own. The MSCP shifted local planning from dysfunctional, piecemeal project-by-project mitigation and a single species focus to large scale, comprehensive, ecosystem plans.

The main attributes/elements of the MSCP (and NCCP's in general) are that it:

- Sets up a partnership with the state and federal wildlife agencies
- Requires the participation of affected stakeholders
- Provides a legitimate biological basis for assurances through the use of sound science from the outset and adaptive management throughout
- Approaches species planning at an ecosystem level
- Covers future as well as currently listed species
- Meets the conservation standard
- Provides a vehicle for eliminating critical habitat where the plan is in place
- Provides a one-stop-shop for local developments and is an off-the-shelf framework for mitigation required by state or local laws, e.g., CEQA
- Provided a template for other, even larger efforts, such as the Western Riverside County Multiple Species Habitat Conservation Plan
- Requires an ongoing funding stream
- Needs leadership by an elected official

The MSCP planning process was an experience of trust building I will never forget. The lessons learned are now integral to the foundation upon which I have continued to pursue the same balance for the State and Governor. Many of the Working Group members remain my closest and dearest professional colleagues.

Utility rights-of-way can be important backbone linkages in a preserve plan. The special needs of utilities are recognized in the state's NCCP legislation, thus encouraging their participation. Infrastructure providers face the same challenges raised by potentially severe endangered species listings constraints as do developers yet 85 percent of their work is for maintenance and operations. Endangered species listings affect essential maintenance and operation activities as well as making planning for new facilities and transmission even more difficult. To maintain safe and reliable energy supply, as well as ensuring needed water for agriculture, homes and businesses, a new way of managing rare species is required. The NCCP program offers a solution. SDG&E, a large energy services company, saw the potential and crafted the first NCCP/HCP that has allowed for both new construction and operations and maintenance to proceed. Since 1995, SDG&E has used its permit over 2,500 times.

Statewide, plan implementation has been underway for almost ten years. Local, state, and federal government have cooperated with environmental interests and landowners to ensure the plans are implemented as approved. In San Diego County alone, voters in 2004 approved almost \$900 million dollars for wildlife protection and habitat acquisition. Since 1991, more than \$24 million in federal funds has been provided for NCCP planning in the five southern California counties. Those funds, plus matching investments from the state, have leveraged private preserve dedications valued in the billions of dollars. From 2001-04, the Resources

Agency's Department of Fish and Game (DFG) successfully competed for \$5.6 million for regional conservation planning in the northern areas of the state. Even with these successes, funding remains a serious challenge to successful implementation, but with matching or assistance from USFWS / DFG, local government has been able to persuade voters to help pay for the costs of assembling and running the preserve.

The original NCCP legislation has been updated and strengthened to increase public participation and improve the scientific underpinnings for future plans. The quality of the plans is uniformly high, but we continue to be vigilant to improve upon them.

A large part of the success of the NCCP approach in California is our having had a strong federal counterpart interested in similar conservation outcomes. The ESA and NCCP Act complement each other such that blending them together into a single conservation planning process makes an excellent case for robust conservation. Even so, we believe we can improve. Achieving ESA/NCCP consistency at the federal level and policy consistency between federal and state endangered species regulation and law is a worthy goal.

After our nearly ten years of experience working in this arena, we have a several **observations and continuing challenges** for your consideration:

Assurances / Certainty

The main reason we have been able to attract local jurisdictions, landowners, and utilities to participate in the NCCP process is the assurance that in the event steps need to be taken to correct a problem with a covered species, for whatever the reason, that those costs will not be passed on to the participating landowners. Utilizing the Congressional intent expressed in the Endangered Species legislative record of twenty-five years ago, a strong *No Surprises* policy is critical this need. This No Surprises policy has been a resounding success. To my knowledge, it has not been invoked to date and we continue to interest local government in habitat conservation. NCCP/HCP's have contingency plans built into them, and adaptive management over time has always been a hallmark of a successful landscape level habitat conservation plan. Given the amount of confusion about what the policy means, a discussion about codifying No Surprises seems in order, and could possibly lead to changes that could remove a cloud of uncertainty over the long-term viability of NCCP/HCP's.

Critical Habitat

We have found that the designation of critical habitat remains controversial. It is not clear, especially given recent court decisions in different parts of the country, what the regulatory implications of critical habitat designation are. Litigation has increased the confusion. Our plans already meet a recovery standard because the NCCP Act requires a conservation standard, which entails recovery, and all NCCP/HCP's meet both state and federal standards. Arguably, the time and money spent on critical habitat matters, including responding to litigation, might better be spent working on the actual species recovery effort. Looking at solutions which would reconcile Sections 7 and 10 of the Act might be helpful. All the parties would benefit from this clarification.

Off-Site Mitigation

Since NCCP/HCP's cover vast swaths of natural lands, the ability for plan participants to offset impacts elsewhere within the planned preserve has been very useful in assembling the

preserve. In some ways, these plans are like puzzles, with pieces being placed as they become available and according to the plan. In San Diego, some local governments have assembled almost their entire preserves, way ahead of schedule; offsite mitigation has been a crucial part of the success of the approach. Many of the participating landowners are also limited by factors such as topography, utility availability and cost when attempting to preserve essential habitat. Providing legislative clarity on the use of offsite mitigation land in HCP planning seems to be an important objective.

Clarification of Public Utility Uses

There is inadequate consideration in federal law of the differences between their operations and traditional development. Any review of the law should consider policy differentiating between the very small impacts associated with repeated maintenance and operations activities and those of traditional land consumptive activities.

Funding for Planning

Local governments do not typically have the significant amounts of money necessary to complete an NCCP plan, estimated from \$3-6 million depending on complexity and the length of time it takes. This problem is exacerbated in difficult state budget times, when state funds to local governments are often reduced. Grants for conservation planning are essential to maintaining momentum in NCCPs. The FWS' HCP Assistance grant program has enabled many jurisdictions to initiate and make significant progress on their plans.

Implementation Commitments: Land Acquisition

The higher conservation standard of NCCP includes the concept and Legislative intent that the public shares in the responsibility to pay for a portion of the conservation. In all NCCPs approved to date, the state and federal governments have agreed to contribute acres to the reserve system and assist with management and monitoring. For example, the state and federal agencies agreed to contribute 13,500 acres to the San Diego MSCP reserve system, and 50,000 acres to the Western Riverside MSHCP reserve system. The demand for federal HCP land acquisition grants is rising, yet the federal funding has declined significantly [over the past two years (2002-\$61.3M, 2004-\$49.4M)]. It is hoped that the state and federal funding streams for land acquisition (typically state bonds and federal grants) will continue at levels sufficient to meet the needs of these and future plans to be approved in [northern] California.

Implementation Commitments: Institutional Capacity

Inherent in commitments, are the wildlife agency staff positions that will be needed for ongoing planning and implementation. Wildlife agency staff need to support the concept as well as continue to be involved in the land use planning process, coordination with local partners on plan implementation, monitoring program compliance, assessing land acquisition priorities, applying for grant funds, and participating in biological monitoring and adaptive management and do so constructively. There are currently no state bond funds or federal grants that can provide the necessary monitoring and management funding for the wildlife agencies to carry out their commitments. New funding sources must be found that will allow the wildlife agencies to uphold their public trust responsibilities to these plans.

In conclusion, proactive planning of our natural resources from a landscape level has been the way California has found to deal with the fact that we are both a "biological hot spot" and a great place to live. The technical products of this labor are only part of the reward. The

relationships and trust that is generated through the process transcends the plans and is invaluable.

Mr. Chairman, I thank you for the opportunity to share our experience with habitat planning. I would be pleased to respond to any questions you might have.

Planning for Conservation under the NCCP Act

Background

In 1991, the California Natural Community Conservation Planning Act (NCCP Act) was enacted into law. Implementation of the NCCP Act (California Fish and Game Code Section 2800 et. seq.) is an unprecedented effort by the State of California, and numerous private and public partners that takes a broad-based ecosystem approach to planning for the protection and perpetuation of biological diversity. A Natural Community Conservation Plan (NCCP) identifies and provides for the regional or area-wide protection of plants, animals, and their habitats, while allowing compatible and appropriate economic activity.

Creating an NCCP is equivalent to creating a land use plan that goes well beyond the scope of biological conservation. The NCCP Act focuses on protection of sensitive species, biological diversity, ecosystem function, etc., but the process and final plan define what land uses will be allowed in the plan area and where they can specifically be located. In many cases, the NCCP process defines the full spatial extent of development that will be allowed in the plan area.

Conservation planning focuses on the future of the both public and privately owned portion of the landscape. Although existing public conservation lands are typically part of the conservation strategy, the main task of the planning process is to define where future development and other consumptive uses of private land will be allowed. Private land in California comprises approximately 51 percent (52 million acres) of the total state spatial extent. Of that private land, 67 percent (35 million acres) is covered by natural or semi-natural vegetation communities. Many listed or sensitive species are dependent on habitat on private lands for their survival. To effect conservation at the scale necessary to ensure the continued survival of these species, the NCCP approach to regional conservation planning is essential. In an NCCP, public and private lands with important habitat value are identified through the planning process, and “become part of a scientifically validated system of reserves, including corridors and linkages with other natural lands, that will be managed for long-term protection of multiple species and other ecological values.” (Murphy, D., *Bioregional Assessments*, Island Press, 1999)

A conservation plan crosses into the realm of delimiting private property rights through the legal exercise of land use planning, therefore, by necessity and statute, it is a public process. Creation of a conservation plan is a voluntary process and involves a diverse array of stakeholders who represent their interests in a negotiated process. The process also provides opportunities for participation by the general public. In a typical conservation plan, a local lead agency with land use authority (city or county) or a large land owner coordinates a collaborative planning process. Working with landowners, development interests, environmental organizations, and other interested parties, the local agency oversees the numerous activities that constitute the development of a conservation plan. These activities include biological data collection, designing a reserve system, identifying proposed development, creating monitoring and adaptive management programs for the reserve lands, and determining funding for implementation. The state and federal wildlife agencies (California Department of Fish and Game (DFG), the U.S. Fish and Wildlife Service (FWS), and NOAA

Fisheries, where appropriate) provide the necessary support, direction, and guidance to conservation planning participants during all of these activities.

The desired result of this process is a comprehensive plan that provides for the species' conservation and management, and that allows the wildlife agencies to issue permits to authorize the take of species under the federal Endangered Species Act (ESA) and NCCP Act. Species whose conservation and management are provided by the plan are called covered species. The NCCP Act provides DFG the authority to permit take of any covered species (whether or not it is listed as threatened or endangered under the California Endangered Species Act). This authority provides an incentive to local applicants to cover certain species not currently listed so they won't have to come back for additional permits should those species become listed in the future. Covering non-listed species requires that they be treated as if they were listed, and can mean the protection of additional habitats, core areas, linkages, ecological processes, and improved reserve configurations that bolster the overall conservation strategy.

The Coastal Sage Scrub Ecosystem Pilot Program

Initially, the California Legislature agreed to a pilot program for protecting the coastal sage scrub ecosystem which occurs across the coastal portions of five Southern California coastal counties – Los Angeles, Orange, Riverside, San Bernardino, and San Diego. This area is identified as a national and arguably international “biodiversity hotspot” due to the total number of species and the number of endemic species found nowhere else. This ecological significance and the increasing rate of urban development made the area an ideal candidate for NCCP.

DFG, FWS, and city and county governments started working closely together on a series of NCCPs for the coastal sage scrub ecosystem. This ecosystem consists of significantly fragmented habitat (less than 340,000 acres, 531 square miles) scattered over more than 6,000 square miles, and is home to approximately 100 potentially threatened and endangered species.

One of the first steps in the planning process was to provide a sound scientific foundation for conservation. A team of independent, widely respected conservation biologists was convened to provide scientific guidance. The guidance they developed (*Southern California Coastal Sage Scrub NCCP Conservation Guidelines*, 1993) led to the identification of biologically based planning subregions. Knowing that a plan of this magnitude would take several years to complete, they recommended interim measures to be applied to new development during the planning phase that would protect sufficient habitat to assure that a robust reserve network could be designed. The team also identified conservation goals, providing a scientific foundation that could guide the participants through the rest of the planning process.

The listing process under ESA provides an option to establish (in certain situations) special rules to adjust the general protective measures available for threatened species. These special rules, established by FWS under Section 4(d), may define conditions under which “take” may be authorized. FWS designated the California gnatcatcher as a threatened species in 1993, meaning that it was likely to become endangered in the foreseeable future. FWS also adopted

a special rule under Section 4(d) that allowed the NCCP program to provide the approach for conservation and recovery of the gnatcatcher.

FWS defined the conditions associated with certain land use activities under which take of gnatcatcher would not be a violation of section 9 of ESA. Under this special rule, the FWS permitted take of gnatcatcher associated with land use activities during the preparation of a plan covered under the NCCP Act as long as the cumulative loss of coastal sage scrub was less than five percent in any individual subregion. This condition followed the coastal sage scrub (CSS) science advisors' recommendation that habitat loss be limited to five percent during the planning phase to maintain the best options for reserve design.

The most important aspect of the use of the 4(d) special rule was that the FWS essentially endorsed the NCCP approach to conservation planning for federally listed and sensitive species. It sent a clear message to local stakeholders that planning for conservation under the state NCCP program would also satisfy the federal standards. This position also gave the necessary feedback to the State that the NCCP approach was worthwhile, and therefore new staff positions and funding could be authorized for DFG to implement the program.

To formally launch the planning efforts, DFG and FWS entered into agreements with individual local jurisdictions and landowners. Approximately 25 subregional or subarea NCCPs were needed to cover the activities of all the local jurisdictions, water districts, and utility providers. Fifty-nine (59) local government jurisdictions, scores of landowners from across these counties, federal wildlife authorities, business and community groups, and environmental advocates are actively participating in the program.

DFG, the Resources Agency, and FWS collaborated to develop the *Southern California Coastal Sage Scrub NCCP Process Guidelines* (1993). The CSS Process Guidelines explain the roles of local, state, and federal governments, and describe how the planning process should proceed, including key features, public involvement, and environmental review. These guidelines were later modified into a set of NCCP guidelines that could be applied statewide.

Nine plans in Southern California have been approved and permits issued, with several others nearing completion. The partnerships that form during the planning phase have proved crucial in moving plans into the implementation phase. These plans do not just go on the shelf: DFG, FWS, and local plan participants make a commitment to an ongoing partnership that will last at least the life of the permits (up to 75 years).

Program Accomplishments

- The first three NCCPs were approved in 1995, 1996 and 1997: these were the San Diego Gas & Electric Sub-Regional Plan, the Central/Coastal Orange County Natural Community Conservation Plan and the San Diego Multiple Species Conservation Program (covering southwestern San Diego County).
- By the end of the 1990s, nine NCCPs were under way in San Diego, Orange, Riverside, Los Angeles, and San Bernardino Counties.
- In August 2000, a programmatic NCCP was approved for the massive CALFED Bay–Delta Program covering water infrastructure and habitat restoration projects throughout the Sacramento-San Joaquin Delta, San Francisco Bay, and Central Valley.

- In July 2004, the Western Riverside Multiple Species Habitat Conservation Plan, covering 1.2 million acres and 146 species, was approved.
- By mid 2004, four northern California regional conservation planning efforts signed NCCP planning agreements, and four others are in early discussion.
- The first “working landscape” NCCP is being developed by the Mendocino Redwood Company to address timber harvest.
- NCCP will be the approach used to resolve Colorado River water transfer issues for the Salton Sea Ecosystem Restoration Project.
- There are 31 active NCCPs of varying scope and complexity.
- Eleven counties are participating in NCCP planning.
- The number of species covered by NCCPs ranges from 12 (Palos Verdes Peninsula) to 146 (Western Riverside MSHCP).
- NCCPs range in size from 8,861 acres (Palos Verdes Peninsula) to 1.2 million acres (Coachella Valley MSHCP).